No. 22000

In the United States Court of Appeals For the Ninth Circuit

FRUIT INDUSTRIES RESEARCH FOUNDATION, d/b/a FOOD INDUSTRIES RESEARCH & ENGINEERING,
Appellant

vs.

THE NATIONAL CASH REGISTER COMPANY,
Appellee

BRIEF OF APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

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INDEX

TABLE OF CASES

Page

OTHER CITATIONS

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JURISDICTIONAL STATEMENT

This action was commenced in the Superior Court of Yakima County, Washington, where the plaintiff's principal place of business and the defendant's branch office were situated, and was removed on petition of the defendant. As appears from the complaint, petition for removal, and the pretrial conference order the District Court had jurisdiction because of diversity of citizenship, the plaintiff being a Washington corporation, the defendant, a Maryland corporation (with its principal place of business at Dayton, Ohio), and there being the requisite amount in controversy (Tr. 1-9, 36, 37. (Tr. herein refers to the clerk's transcript of rec-

ord, and R. refers to the court reporter's record of trial proceedings.) 28 U.S.C. 1332 and 1441.

This appeal is by the plaintiff from a final decision and judgment dismissing the action entered by the District Court, and this Court therefore has its customary appellate jurisdiction to review the same. (Tr. 72, 79). 28 U.S.C. 1291.

STATEMENT OF THE CASE

This is an action at law to recover damages in the sum of $150,000.00 brought by the purchaser against the seller of certain very expensive electronic computer data processing equipment, referred to as an NCR 390 console and central processer machine and its accessories.

The basis of the action is actual or constructive fraudulent misrepresentations by the defendant through its sales representative, Chester K. Rasmussen, at Yakima, Washington, which were relied upon by the plaintiff and induced the plaintiff to purchase this equipment, namely (A) that this equipment was in all respects suitable, appropriate and adequate for successful profitable service bureau data processing and computer work; and (B) that the defendant promised and agreed to procure and provide at its own expense sufficient patronage and customers for the plaintiff so that the plaintiff could operate a commercially successful profitable data processing service bureau business at Yakima without any sales staff work by

the plaintiff; and that said promises, agreements and statements were made by the defendant with the fraudulent intention not to perform the same. A service bureau means the business of doing computer data processing work not merely for the owner of the equipment, but commercially for the general public for compensation. (R. 215-6).

The case was tried with a jury (Tr. 15). As to (A) at the close of the plaintiff's evidence the District Court denied the defendant's motion for dismissal (R. 524-7) but granted the said motion at the close of the defendant's evidence (R. 529-593). The basis of the decision was that Phillip B. Fluaitt, the plaintiff's treasurer and office manager, had information at the time of the purchase that the print-out rate of this equipment was relatively slow, that being one of the several defects shown by the evidence.

The fundamental error of the court was in disregarding as irrelevant the evidence that the defendant through Rasmussen further represented to and assured Fluaitt that the print-out rate of this equipment was not significant or important, and that notwithstanding this, the equipment was fully suitable, appropriate and adequate for such service bureau work by the plaintiff, and this was believed and relied upon by the plaintiff in making the purchase, the plaintiff at that time having little or no knowledge concerning the same.

As to (B) the court granted defendant's motion for

dismissal at the close of plaintiff's evidence on the ground that the defendant made such promises and statements to provide future patronage, but that there was not sufficient proof that the defendant had a fraudulent intention not to perform the same (R. 504-7, 526).

Thus the principal questions presented on this appeal are whether, construed with all reasonable inferences most favorably to the plaintiff, sufficient substantial prima facie evidence was introduced to entitle the plaintiff to have the case submitted to the jury as to these issues (A) and (B) or either of them.

The plaintiff's evidence, which was extremely voluminous, may be briefly summarized as follows:

In the autumn of 1961, Chester K. Rasmussen was appellee's manager of accounting and data processing machine sales at Yakima, Washington, where the appellant's place of business was located. During a period of several months Rasmussen contacted and had numerous conferences with appellant's representatives, Earl W. Carlsen, its president and managing director, D Loyd Hunter, its vice president, secretary and chief engineer, and Phillip B. Fluaitt, its office manager and treasurer, in which he was endeavoring to sell this equipment (R. 26-7). One of the departments of appellant's business was previously engaged in service bureau work on a small scale, using only card punch equipment (R. 27, 119-121, 142-3, 215-6, 221-2, 242, 313, 316-8).

As to the said issue (A) Rasmussen in his testimony admitted that he represented to appellant's officers that this NCR 390 equipment was suitable and adequate for service bureau work, and that it was recommended by appellee and himself for that purpose, and that it was being used by numerous other companies for that purpose (R. 27-30, 59, 60). This is confirmed in appellee's answers to interrogatories (R. 12, 18). However, Rasmussen admitted that this was the only sale of NCR equipment that he ever made for service bureau work, and he knew this was being purchased by appellant for that purpose (R. 60-1).

Rasmussen admitted that he understood and intended that appellant in purchasing the equipment would rely upon the statements and representations which he made as being correct (R. 41-2).

Rasmussen gave them typewritten literature stating in effect that large profits would be made by a service bureau using the NCR 390 in that particular area (Ex. 1; R. 148, 333).

The testimony of appellant's officers, Carlsen, Hunter and Fluaitt, establishes by clear, cogent and convincing evidence that in these sales negotiations Rasmussen repeatedly and definitely represented to each of them in various conversations that this NCR 390 equipment was in all respects suitable, appropriate and adequate for such successful profitable service bureau work in the southeast Washington area (R. 98-9, 105, 125-7, 134-5 [Hunter]; 145-6, 220-1, 229, 241 [Flu-

aitt]; 318-326, 332-3, 370, 508, 511-2 [Carlsen]). Rasmussen also represented that this equipment was capable of being easily programmed (R. 330-1). (Please note that by error the reporter's page numbering reverts from 236 to 227 and there is duplicate pagination for ten pages of very important testimony.)

With a minor exception as to Fluaitt hereinafter mentioned, it is undisputed that none of appellant's representatives had any previous knowledge, familiarity or information as to the NCR 390 equipment and no knowledge that Rasmussen's representations were not correct (R. 107, 151, 216, 234, 239, 243-4, 247, 252, 343, 394-5).

Appellant relied upon these statements and representations of Rasmussen and otherwise would not have purchased the equipment (R. 106-7, 151, 334, 369, 371).

In reliance thereon appellant on December 1, 1961, executed the written contract for the purchase of this equipment, the final decision being made by Carlsen (Ex. 2; R. 10, 43, 48, 150-2, 343, 368).

Delivery was not made until almost a year later, in November, 1962, and the equipment was not set up for operation until a month thereafter (R. 61-2, 107, 154-5, 236, 334-5).

Appellant paid to appellee the agreed purchase price thereof in the sum of $92,490. 67 (Ex. 4; R. 16, 48, 152-3, 335).

In the spring and summer of 1963, after receiving

and using this equipment, appellant and its representatives for the first time became aware of the fact that these statements and representations of Rasmussen as to the suitability and adequacy of the equipment for successful service bureau work were false and wholly incorrect. Its use demonstrated that it was wholly unsuitable and inadequate for that purpose. There were several reasons for this, namely (1) that the input reading rate was too slow; (2) the print-out rate was too slow (only one letter like a fast typewriter, or twelve numerical digits at a time); (3) it was inadequate for doing alphabetical work, which was essential for that purpose; and (4) the memory core, consisting of only 200 cells, was wholly inadequate for such purpose. Also, there were frequent serious malfunctions and breakdowns requiring expensive repairs (R. 108-111, 137, 180-5, 203, 234-7, 229-232, 245-9, 252-3, 265-9, 273-7, 280-6, 336-42, 347-8, 389-93, 401-2, 416, 439-46, 508, 511-4).

Consequently in making such false misrepresentations Rasmussen, as an experienced salesman of such equipment, must either have known that the same were false, or he made the same recklessly without knowledge of their truth.

Appellant made numerous complaints to appellee, and particularly to Rasmussen, as to the inadequate, unsuitable and unsatisfactory operation of the equipment, but appellee wholly disregarded these complaints (R. 89-94, 133-4, 187-8, 348-51, 408-10).

Thereafter in 1965 appellant leased an IBM 1401 machine which did operate successfully for this purpose (R. 256, 291-2, 298, 392, 398-9, 410-1). With considerable difficulty appellant was finally able in January, 1966, to resell this NCR 390 equipment for only $14,500.00 to a purchaser which was not a service bureau (Ex. 6; R. 358-9, 364, 461, 525).

The NCR 390 equipment is not used by any service bureau at any location (R. 20, 31-3, 302, 304, 351, 417, 440-1; Tr. 21-32).

By reason of these facts appellant sustained a large amount of damages. As hereinabove stated it paid $92,490.67 for the equipment, and was able later to resell it for only $14,500.00. The evidence further establishes that at the time of the sale if Rasmussen's statements and representations had been correct the equipment would have had a value of approximately $125,000.00, but its actual market value at that time did not exceed $25,000.00. This department of appellant's business was continually operated at a large loss (R. 353-358).

Rasmussen testified that the print-out rate of this NCR 390 equipment was 12 digits per one-half second and that this was a fast and not a slow print-out rate for data processing, as it is faster than a human being can type (R. 30, 62, 64-7). He further testified that the tape reading rate of this unit was fast, nearly 400 characters per second (R. 62-3).

Fluaitt testified that the print-out rate was relatively

slow for some applications and he knew this in a general way previously, but at the time of the purchase he was not at all familiar with this equipment and therefore believed and relied upon the representations and assurances of Rasmussen that the print-out rate was of minor importance and would not interfere with the suitability or adequacy of the equipment for profitable service bureau work (R. 234-5, 227-9, 239, 241, 243-4, 247-8, 394). This testimony, in view of its importance, will be again referred to in the argument. Fluaitt never mentioned the print-out rate to Carlsen, appellant's president, who made the final decision (R. 384, 393-4).

Referring now to issue (B), in addition to the testimony hereinabove mentioned, Rasmussen admitted that he told appellant's representatives during the sales negotiations that appellee, through its 27 employees in the area, would procure patronage, customers and business for appellant's service bureau using this equipment. He stated that an additional advantage of this arrangement to appellee and himself was in the sale of in-put unit equipment for punching tape which would be used by such service bureau customers (R. 34-8; Ex. 1). This was confirmed in appellee's answer to interrogatories (R. 13-15).

The testimony of appellant's officers also establishes by clear, cogent and convincing evidence that Rasmussen repeatedly and definitely represented to each of them in various conversations that appellee, through its sales staff, would procure customers and business

for appellant so that it could operate a successful profitable service bureau using this equipment and that it would not be necessary for appellant to have any sales staff of its own for this purpose (R. 98-102, 105, 127-30, 134-6 [Hunter]; 146-50, 229, 241, 243 [Fluaitt]; 320-33, 369, 372-3 [Carlsen]).

Rasmussen also admitted that there was never any intention on his part, or on the part of appellee, to furnish sufficient customers to appellant to make appellant's service bureau a successful profitable operation without any sales staff of appellant soliciting customers (R. 38-41).

He also admitted that after appellant purchased this equipment appellee sent data processing business from Tufts' Drug Stores, a Yakima business, to a service bureau operated elsewhere by appellee. Appellee sold Tufts the input equipment used by it for this purpose (R. 78-80).

In order to further increase appellant's confidence and reliance upon these statements, Rasmussen stated that he would be interested in purchasing stock in appellant corporation because of its anticipated future successful profitable service bureau business. Later, however, when offered the opportunity, Rasmussen refused to do so (R. 57-9, 102-3, 153-4, 320, 328, 371, 381, 413-5, 418).

He told them that if they did not purchase this equipment appellee would sell it to someone else for the purpose of establishing and operating a service bureau

data processing business at Yakima (R. 80-1).

Although sending a few small unprofitable customers to appellant, appellee and Rasmussen wholly failed to carry out or perform these promises, statements and representations as to future patronage, and it clearly appears that there was at all times a fraudulent intention not to perform the same (R. 109-11, 133-4, 179-80, 232, 287, 338, 344-5, 394-6, 398-9, 407-10, 416-7). This was confirmed by letter from appellee's home office (R. 480-1; Ex. 5).

SPECIFICATION OF ERRORS

The district court erred:

1. In sustaining the defendant's challenge of the sufficiency of the evidence as to issue (A) hereinabove mentioned to establish any liability on its part, and in granting defendant's motion for dismissal as a matter of law (R. 529-593).

2. In finding and holding that the plaintiff failed as a matter of law to prove the nine essential elements of fraud (R. 529-593).

3. In finding and holding that plaintiff had knowledge of the falsity of defendant's misrepresentations so as to preclude recovery as a matter of law (R. 586-591).

4. In finding and holding that plaintiff had no right to rely upon defendant's misrepresentations so as to preclude recovery as a matter of law (R. 586-91).

5. As to issue (B) hereinabove mentioned, in grant-

ing defendant's motion for dismissal of plaintiff's claim of misrepresentations by defendant with reference to its securing customers, patronage and profitable business for plaintiff (R. 504-7, 526).

6. In discharging the jury from further consideration of the case (R. 590-3).

7. In entering the judgment and order of dismissal (Tr. 72-3).

8. In denying the plaintiff's motion for new trial (Tr. 75-8).

SUMMARY OF ARGUMENT

1. As to issue (A) hereinabove mentioned the court erroneously held that partial knowledge of Fluaitt as to the relatively slow print-out rate of this equipment on certain applications precluded recovery as a matter of law. But in so holding the court erroneously disregarded as irrelevant the fact that Rasmussen, having far superior knowledge as to the capabilities of this machine, positively assured and represented to them that the print-out rate was of no material importance.

2. As to issue (B) hereinabove mentioned the court erroneously held that there was not sufficient evidence to submit the case to the jury on the theory that Rasmussen fraudulently promised and represented that appellee would furnish sufficient customers and patronage so that appellant would have a successful profitable data processing service bureau business without the necessity for any sales staff assistance by appellant,

and that there was no intention to perform such agreement and it was not in fact performed. Actually, as hereinbefore shown, there was ample prima facie evidence for the submission of this issue to the jury.

ARGUMENT

1. APPLICABLE GENERAL LEGAL PRINCIPLES.

It is of course elementary that in a diversity case such as this the law of Washington governs. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487; *Walla Walla Port District v. Palmberg*, (9 Cir.) 280 F. 2d 237. This was recognized by the district court and all counsel (R. 507).

It is also well settled that a motion for nonsuit of this nature in a jury trial involves no element of discretion and can be granted only when reasonable minds cannot differ and when there is no evidence or inferences from the evidence to support a recovery. As stated in *Messina v. Rhodes Co.*, 67 Wn. 2d 19, 406 P. 2d 312:

> "A motion for nonsuit admits the truth of the evidence, *and all inferences arising therefrom*, of the party against whom the motion is made. It requires that the evidence be interpreted most strongly against the moving party and most favorably to the opposing party. *It is only when the court can say that there is no evidence at all to support the plaintiff's claim that the motion can be granted.* (Citing cases) . . .
>
> "We are of the opinion that reasonable minds could differ as to both of the two issues presented by the present case.

"Therefore, the judgment of dismissal is reversed, and the case is remanded for a new trial."

(All italics herein are ours)

See to the same effect the cases therein cited, and also:

Trudeau v. Haubrick, 65 Wn. 2d 286, 396 P. 2d 805;

Anderson Feed & Produce Co. v. Moore, 66 Wn. 2d 237, 401 P. 2d 964;

Hall v. Puget Sound Dredge & Drydock Co., 66 Wn. 2d 442, 403 P. 2d 41;

Hurst v. Washington Canners Co-op, 50 Wn. 2d 729, 314 P. 2d 651.

In each of these cases, as well as numerous others, the Washington Supreme Court reversed a dismissal after a nonsuit was granted.

Consequently, since in this case appellant did introduce evidence which, favorably construed, together with the reasonable inferences therefrom, does support a recovery, the court clearly should have submitted the case to the jury under appropriate instructions, and it would have then become the function of the jury to weigh the evidence and make the final determination whether the essential facts were established by the required degree of proof. Refusal to do so therefore manifestly constitutes reversible error.

2. ACTIONABLE MISREPRESENTATIONS AS TO ADEQUACY FOR SERVICE BUREAU WORK.

Referring to issue (A) as to the misrepresentations that this equipment was in all respects suitable, appropriate and adequate for data processing service bureau

work, the evidence as hereinabove summarized amply establishes by clear, cogent and convincing evidence all of the nine essential elements of fraud. As stated by the Washington Supreme Court in sustaining a recovery for fraud in *Swanson v. Solomon*, 50 Wn. 2d 825, 314 P. 2d 655:

> "In order to recover for fraud, the following must be proved: (1) a representation of an existing fact; (2) its materiality; (3) its falsity; (4) the speaker's knowledge of its falsity *or ignorance of its truth;* (5) his intent that it should be acted on by the person to whom it is made; (6) ignorance of its falsity on the part of the person to whom it is made; (7) the latter's reliance on the truth of the representation; (8) his right to rely upon it; (9) his consequent damage. Webster v. L. Romano Engineering Corp., 178 Wash. 118, 34 P. (2d) 428. We have also held that *a person cannot defeat recovery by a showing that he did not know his representations were false or that he believed them to be true, if he made them recklessly and carelessly without knowing for certain whether they were true or false.* Holland Furnace Co. v. Korth, 43 Wn. (2d) 618, 262 P. (2d) 772, 41 A.L.R. (2d) 1166."

Referring again to the basis of the court's decision granting the nonsuit because of Fluaitt's alleged partial knowledge, he testified as follows:

"Q Did you, Mr. Fluaitt, at that time, have any knowledge or information to the contrary, that is, to the effect that the statements, or any of them, that were made to you by Mr. Rasmussen were not correct?

A No, sir.

Q Specifically, I will ask you whether or not at the time of this purchase you had any knowledge or information on your part that the NCR 390 machine was not suitable or adequate for service bureau work?

A I did not, no, sir." (R. 151) . . .

"Q After you received this 390 equipment, just answer this first question yes or no, did you later learn whether or not it was suitable and adequate for service bureau work?

A Yes.

Q And what did you later ascertain in that respect?

A For the jobs requiring a quantity of printing, either alphabetic input or alphabetic output, the 390 is too slow." (R. 180) . . .

"Q When did you first know what you just stated, that is, that the 390 was not suitable or adequate for service bureau work? When did you obtain definite knowledge of that?

A Well during the first few months having it on our premises we were learning to operate it, therefore, were learning what its capabilities were, so therefore it was later in 1963 that we ran these — . . .

THE COURT: His question was, when did you first learn it wasn't adequate. All right, when was that?

THE WITNESS: *The late spring of* 1963." (R. 184-5)

On cross examination he further testified:

"Q Now, Mr. Fluaitt, do I understand the first time you ever heard of, saw, or knew anything about an NCR 390 was when Mr. Rasmussen approached you?

A *The first time I had any direct knowledge of it, yes.*" (R. 216) . . .

"Q . . . I said that you determined in your own mind, and understood that the printout, in your opinion, was too slow before you even bought the machine?

A. Yes, *in my relation to a computer of which I knew nothing*, compared to tabulating on card equipment which I was acquainted with.

Q Tell me, and tell the Court here, when it was that you first determined in your own mind that the printout of this equipment was too slow.

A As I stated, during our early discussions, it would be too slow for some things . . .

Q In any event, you had arrived at that conclusion?
A. *That conclusion, which was offset by Mr. Rasmussen's—*
Q Well, now, you had arrived at it, is that right?
A In a limited fashion, yes." (R. 234-5) . . .
"Q And you already had a line printer on hand, didn't you; and you intended to use this in connection with the NCR 390?
A We would use the equipment — we would hope that we would be able to dispense with the old equipment and use entirely the new.
Q Now actually, Mr. Fluaitt, it was your position and your determination based on your knowledge with respect to this machine, that *it really is not of importance to you whether this equipment reads fast or slow; it is just whether it will do the job,* isn't that right?
A *This was the point of view given to us by Mr. Rasmussen, that these were a minor factor that it printed slowly, that he would be able to provide us jobs and accounts where this would not be so terribly important. The computing portion of the* NCR 390 *is the part that he played up greatly.*
Q Well, I am not concerned with Mr. Rasmussen. My question relates to your own concept of the importance of whether something is fast or slow. This was of actually no importance to you, at least, in determining to acquire the machine?
A The fact of whether it did or didn't—*the fact of what we were told by Mr. Rasmussen encouraged us to assume that the slowness would be no great problem.*" . . .
"Q What you are telling me is that the statement was made that 'This machine will take care of the data processing work you have, and we will provide for you.' Do you read into that the implication that it will read fast and print out fast?
A No. *I read into it that it will do the things that must be done, whether it reads fast or slow is of no importance, it is the point it will do these things.*" (R. 228b-9b) . . .
"Q And as I understood your testimony earlier, you

have testified you had not seen one of these machines in operation before?

A Not that I recall, sir." (R. 239) . . .

"Q Is it true that so far as the printout of the machine was concerned, its speed, or lack of speed I am referring to now, that you had planned in advance that you were going to do the printing with your other equipment, anyway?

A Not entirely." (R. 241)

On redirect examination he further testified:

"Q At the time of the purchase of this machine, as you have already testified, you had some knowledge as to the slowness of the printout rate. My question is, when this machine was purchased, did you, assuming as you have testified, that it later turned out to be inadequate in its capabilities for service bureau work, my question is, did you have any knowledge at the time of the purchase of this machine as to its inadequacy for service bureau work?

A *I would not be aware of total computer requirements at that date, not being a computer-oriented person.*" . . .

"Q I say, at the time of the purchase of this machine, did you have—assuming that it later turned out to be inadequate—*did you have any knowledge at that time of the inadequacy of the* 390 *machine for doing service bureau work?*

A *No, sir.*" (R. 243-4)

On recross examination he testified:

"Q Now you tell us, Mr. Fluaitt, that at the time you acquired this machine, until after you acquired it, you had *no knowledge of its inadequacies for service bureau work until after it got here* and you tried to work with it; is this right?

A Yes, sir." . . .

"Q So there is an inadequacy, that you call an inadequacy, that you knew about even before you acquired the machine, isn't this true?

A *This again is where Mr. Rasmussen insisted that*

this machine would take care of all of our work, and we assumed—

Q Well, I'm sorry, Mr. Fluaitt." (R. 247-8)

He later learned, after using the equipment that its memory core was insufficient and that the read-in rate was too slow as to alphabetical input (R. 248-9).

Carlsen testified as to Fluaitt:

"Q . . . Now at that time you first observed this did he reveal to you that he had had this knowledge all along, even before the machine had arrived, of the nature of the printout, did he tell you that then?

A He had the knowledge, if any, in relative terms. He had felt that it would be fast enough that we could move the 405 out. *He had no knowledge of computers prior to his indoctrination into the* 390." (R. 394)

Rasmussen testified that the print-out rate of this equipment *was not slow*, but was fast (R. 30, 62-7).

In the light of this testimony this case is governed by the well settled Washington rule that a purchaser has a right to rely upon assurances of the seller that a defect known to the purchaser is not sufficiently serious as to be substantially detrimental or impair the desirability of the property. Under such circumstances the purchaser's knowledge of such defect does not constitute a defense in his action to recover for fraud.

In *Miraldi v. Wick*, 117 Wash. 207, 200 Pac. 1094, the purchaser of a ranch observed and knew that a substantial portion of it was covered with alkali. Nevertheless the court affirmed recovery by him in a fraud action, saying:

"*The respondent's testimony* is to the effect . . . that he visited the land in company with this person, and while on the land discovered that in a few spots the land was covered with a white substance, and on inquiry was told that it was alkali; that he then inquired what effect alkali had on land and was told that too much would hurt, but that the quantity on this land would not interfere in any way with the growing of crops thereon. The respondent further testified that, on his return to the appellants' offices for further negotiations concerning the lease, he took the matter up directly with the appellants, and was told by them that there was not sufficient alkali on the land to affect the crops; that the small quantity there would act rather as a fertilizer to the crops planted than as an injury to them . . .

"Unquestionably, as the appellants contend, it is the law that where parties deal with each other as strangers with respect to land, and the means of knowledge concerning it are equally open to both, the one may not say that he has been deceived by the representations of the other, even though the representations be false. But the rule is otherwise where the means of knowledge are not equally open, and here they were not so. The respondent, if his testimony is to be believed, did not know that there was alkali in the land *sufficient in quantity* to prevent growing crops thereon; and it was *the duty* of the appellants, if they undertook to inform him on the subject at all, *to inform him truthfully*, and are answerable for the damages suffered by him if they did not so inform him."

The *Miraldi* case was approved and followed in *Rummer v. Throop*, 38 Wn. 2d 624, 231 P. 2d 313. It was an action for fraud in the sale of a ranch due to the damaging effect of magnesium dust from a large plant situated adjacent thereto. The purchaser had full knowledge of the existence of this plant and he had

been warned as to the damaging effects of this dust. He signed a contract agreeing to the restrictions in the recorded deed from the magnesite company which released it from liability for the effects of such dust. Nevertheless the court affirmed a judgment for the plaintiff, and held that he had the right to rely upon the seller's assurances minimizing the effect of the dust. Judge Hamley, speaking for the court, said:

> "In the evening of that same day, Rummer was informed by his stepfather that he had better be careful 'getting up in there.' The stepfather warned that 'you are going to get into some dust,' and stated that the plant has given trouble ever since it had been there. . . .
>
> "Appellant's argument in support of these assignments of error is to the effect that respondent had actual and constructive knowledge of the dust condition, and hence had no right to rely upon any representation which Throop may have made on the subject. . . .
>
> "In Cunningham v. Studio Theatre, ante p. 417, 229 P. (2d) 890, this court quoted with approval the following statement regarding the right to rely:
>
> " 'The rule is followed at the present time in practically all American jurisdictions, in respect of transactions involving both real and personal property, that one to whom a positive, distinct, and definite representation has been made *is entitled to rely* on such representation and *need not make further inquiry* concerning the particular facts involved. This rule is a corollary to the broad principle of a general right of reliance upon positive statements. Under this rule it is sufficient if the representations are of a character to induce action, and do induce it, and the only question to be considered is whether the misrepresentations actually deceived and misled the complaining party. Under

such circumstances, it is immaterial that the means of knowledge are open to the complaining party, or easily available to him, and that he may ascertain the truth by proper inquiry or investigation.' [23 Am. Jur. 970, Fraud and Deceit, Sec. 161.]

"Tested by this rule, there seems little doubt that Rummer had the right to rely upon Throop's representation. By reason of the information which had come to him through the several sources referred to above, very serious doubts had been raised in Rummer's mind regarding the dust situation. He could have queried neighboring farmers and learned the truth. He could have gone to the county auditor's office and examined the deed, which made specific reference to damage from magnesium oxide dust. Instead, Rummer went to the vender, Throop, for the facts. *Rummer may have been foolishly credulous in doing this, but that would not deprive him of the right to rely.* . . .

"Where a representee makes only a partial investigation, and relies in part upon the representations of the adverse party, and is deceived by such representations, the authorities agree that he has a right to rely, and may maintain an action for such deceit. (Citing cases) . . .

"The rule just stated is particularly applicable where as here, the representation was designed to deter further investigation. . . .

"In Wescott v. Wood, 122 Wash. 596, 212 Pac. 144, the decision affirming a judgment for the plaintiff in a fraud action contains this comment:

" 'Indeed, the representations were such as would naturally lead respondent to deem it unnecessary to make any investigation.'

"Assuming that Throop had no duty to volunteer information relative to dust damage, such duty clearly attached as soon as the vendee made specific inquiries of the vendor regarding that matter. It then became Throop's duty to inform Rummer fully

and truthfully, and to say nothing which would deter Rummer from investigating further. In this respect the case before us is much like Miraldi v. Wick, 117 Wash. 207, 200 Pac. 1094. There the respondent vendee was permitted to recover damages for fraud, upon a showing that the alkali content of the soil was excessive, even though the vendee had inspected the premises. We said:

" 'The respondent, if his testimony is to be believed, did not know that there was alkali in the land *sufficient in quantity* to prevent growing crops thereon; and it was the duty of the appellants, if they undertook to inform him on the subject at all, to inform him truthfully, and are answerable for the damages suffered by him if they did not so inform him.'

"It is our opinion, in view of the foregoing considerations, that respondent *had the right to rely upon appellant's reassurance as to the dust situation.* This representation alone was sufficient to justify rescission, if found to be false. It is therefore not necessary to consider whether the findings of fact relative to the other asserted representations are contrary to the clear preponderance of the evidence."

We submit that the Rummer case is conclusive, and that Fluaitt had the right to rely upon Rasmussen's assurances that the print-out rate was sufficiently rapid so that the equipment was fully adequate for service bureau work. These assurances and representations were naturally designed and had the effect of deterring Fluaitt, who admittedly had very little knowledge on the subject, from making any further investigation.

In *Jenness v. Moses Lake Development Co.*, 39 Wn. 2d 151, 234 P. 2d 865, the court reversed a judgment

of dismissal in a fraud case and quoted the Rummer case with approval. Before the sale transaction was closed the purchaser learned that the previous representation that the pinball machines went with the tavern was false, and the purchaser was shown the daily reports, which showed the falsity of the representation as to the income of the business. The court said:

> "The second answer to respondents' argument is that, under the rule followed in this state, appellants were under no duty to investigate the representations made to them. . . ..
>
> "Tested by the foregoing rules, we conclude that the vendees had a right to rely on the representations. Unquestionably, appellants were naive and credulous, particularly in the light of their experience in the tavern business, but the rule is well settled in this jurisdiction that *a wrongdoer cannot defend his wrongful actions by calling attention to his victim's gullibility.*" (Citing cases)

In *Forsyth v. Dow*, 81 Wash. 137, 142 Pac. 490, the court reversed a judgment of dismissal after granting a motion for judgment n.o.v. and said:

> "Plaintiff admitted that he was told, before the trade was consummated, that the motors could be purchased for a less sum of money than he paid; that he had heard that the motors could be purchased for less money; but he says that, when he took the matter up with defendants, they quieted his suspicions and made him believe that they were paying the full price to the electric company. . . .
>
> "The statement of a consideration in an instrument offered for filing is only prima facie evidence of the true consideration. If it were not so, and plaintiff had made inquiry, he would probably have been quieted by the same assurance that satisfied him when he took the matter up with the defendants upon oral rumor.

"Another possible reason is that the court believed that the attorney whom plaintiff had employed in the transaction had notice of the amount that was actually paid to the electric company. We have read the testimony of the attorney and we are not sure that he ever communicated such notice to the plaintiff. Plaintiff says that he did not. . . .

"Remanded with directions to vacate the judgment entered *non obstante veredicto*."

The Forsyth case was quoted, approved and followed in *Scroggin v. Worthy*, 51 Wn. 2d 119, 316 P. 2d 480, which is also conclusive. The purchaser was informed by a third party that the trailer park had been condemned by the health authorities because of a defective sewer. She was assured, however, by the seller that this report was not correct. The court affirmed judgment for the plaintiff and said:

"The appellants argue that the renewal of the fraudulent representations does not relieve respondent of the duty to pursue her independent investigations. *This court held otherwise* in Forsyth v. Dow, 81 Wash. 137, 142 Pac. 490. . . .

"The matter was dealt with at length by the California district court of appeal in Kalkruth v. Resort Properties, 57 Cal. App. (2d) 146, 134 P. (2d) 513. It was there said:

" 'When Wells, a stranger to Kalkruth, said the cabin had been built on the wrong lot, Kalkruth immediately and naturally consulted a man who should have knowledge of the facts, namely, the president of the vendor corporation who was active in the maangement of its affairs. Lyon and Kalkruth returned to the cabin and made measurements. Lyon, who should have known the true facts, assured Kalkruth that everything was all right. *We see nothing unusual in Kalkruth accepting this assurance as true as against a statement of a stranger*

to the contrary. We believe that when, as here, the buyer has only a suspicion of the fraud, and the seller who has defrauded the buyer, lulls the buyer into a sense of security by both words and conduct, the seller should not be permitted to assert that the buyer had lost his rights by waiving the suspicion and accepting the reassurance of the seller that no fraud had been perpetrated. This rule was applied in Curtis v. Title Guarantee etc. Co., 3 Cal. 2d 612 [40 P. 2d 562, 42 P. 2d 323], where it was said:

" 'Respondent testified that when she saw the university buildings were not being constructed she talked to an agent of respondent, [appellant] who explained the delay by informing her that representatives of the university were in the east raising money. This apparently quieted her fears and she made her payments. Where the vendor by promises or representations to the vendee causes the vendee to postpone efforts to rescind the contract the vendor cannot urge the failure of the vendee to rescind within the time during which the vendee's fears of fraud have been lulled by such representations. (Cooper v. Huntington, supra, [178 Cal. 160 (172 P. 591)].)' (See, also, Lozier v. Janss Investment Co., 1 Cal. 2d 666 [36 P. 2d 620].)

Such, likewise, was the rule followed in Converse v. Blumrich, 14 Mich. 108; McWilliams v. Barnes, 172 Kan. 701, 242 P. (2d) 1063; Bagdasarian v. Gragnon, 31 Cal. (2d) 744, 192 P. (2d) 935. See, also, 37 C.J.S. 278, 281, Sec. 34(d).

"Moreover, caveat emptor does not apply to a misrepresentation of a material fact made for the purpose of inducing a sale. That subject was quite recently considered by the United States court of appeal in Byrnes v. Mutual Life Ins. Co., 217 F. (2d) 497 (C.C.A. 9th), in which District Judge Yankwich announced the court's conclusions in the following language:

" 'In the olden days, under the doctrine of caveat emptor, courts were inclined to think that a man dealt with another at his peril and that he should

be on the lookout for possible deception, failing which, he would be penalized as negligent in failing to discover the fraud that was being perpetrated on him. The modern rule is against such an attitude. A man who deals with another in a business transaction has a right to rely upon representations of facts as the truth. Restatement, Torts, Sec. 540; Prosser on Torts, pp. 748-749; 23 Am. Jur., Fraud and Deceit, Sec. 1446; Illinois Bankers' Life Ass'n v. Theodore, 1934, 44 Ariz. 160, 34 P. 2d 423; Lahay v. City Nat. Bank, 1891, 15 Colo. 339, 25 P. 704; Seeger v. Odell, 1941, 18 Cal. 2d 409, 415, 115 P. 2d 977, 136 A.L.R. 1291. These authorities sustain the view that one who has intentionally deceived another shall not be heard to say that the other person should not have trusted him. As the Supreme Court of Vermont said in an old case,

" " 'No rogue should enjoy his illgotten plunder for the simple reason that his victim is by chance a fool'. Chamberlin v. Fuller, 1887, 59 Vt. 247, 256, 9 A. 832, 835, 836.'

"This court reached the same conclusion in Wooddy v. Benton Water Co., 54 Wash. 124, 102 Pac. 1054."

In *Holland Furnace Co. v. Korth,* 43 Wn. 2d 618, 262 P. 2d 772, 41 A.L.R. 2d 1166, the court affirmed a judgment in favor of the purchaser in a fraud action involving the sale of a furnace. Judge Hamley, speaking for the court, said:

"But where the salesman does assert such special and peculiar knowledge, and the buyer relies thereon, *a statement that the article is appropriate for, and will satisfactorily meet, the buyer's requirements will be regarded as a representation of fact.* Holcomb & Hoke Mfg. Co. v. Auto Interurban Co., 140 Wash. 581, 250 Pac. 34; Weller v. Advance-Rumely Thresher Co., 160 Wash. 510, 295 Pac. 482. See, also, 51 A.L.R. 46, 81, annotation.

"Under the findings of fact summarized above,

this case is governed by the rule announced in the Holcomb and Weller cases. The requirement that the representation be of an existing fact has therefore been met.

"Another essential element necessary to establish actionable fraud is that the speaker must have 'knowledge of its falsity *or ignorance of its truth.*' (Italics ours.) . . .

"The italicized portion of the above-quoted language from the Webster opinion is but another way of stating the rule that if a person represents as true material facts susceptible of knowledge, to one who relies and acts thereon to his injury, he cannot defeat recovery by showing that he did not know his representations were false, or that he believed them to be true."

In *Coson v. Roehl*, 63 Wn. 2d 384, 387 P. 2d 541, the court sustained a recovery by the purchaser and said:

"Recently, this court had occasion to notice that there has been a

"'. . . marked change in judicial attitude during the last half century toward the question of justifiable reliance . . .' Johnson v. Olsen, 62 Wn. (2d) 133, 135, 381 P. (2d) 623 (1963) . . .

"The policy reasons behind the majority rule are discussed in the classic case of Angerosa v. White Co., 248 App. Div. 425, 290 N.Y.S. 204 (1936):

"'. . . To deny relief to the victim of a deliberate fraud because of his own negligence would encourage falsehood and dishonesty,' . . .

". . . In this jurisdiction protection is given to one who is injured by falsehood or deception; fraud vitiates everything which it touches, and destroys the very thing which it was devised to support; the law does not temporize with trickery or duplicity. A contract, the making of which was induced by deceitful methods or crafty device, is nothing more than a scrap of paper, and it makes no difference

whether the fraud goes to the factum, or whether it is preliminary to the execution of the agreement itself . . .

"Plaintiff argues that the contract shows on its face that defendants were to pay $71.88 per month for a period of 60 months. The product of these figures ($4,312.80) would have been apparent to defendants had they been facile with mental arithmetic. This, of course, is in direct conflict with the written price of $3,500.00, defendants's insistence that they would pay no more, and the agents' representations that $3,500.00 would include all charges. *Misrepresentations frequently have the effect of causing the other party to fail to use the means of knowledge within his power.*

"One authority said:

" 'The modern tendency is certainly toward the doctrine that failure to use available means of knowledge because of reliance on misrepresentation, even negligent failure to use them, because of trusting to a misrepresentation, will not excuse positive willful fraud or deprive the defrauded person of his remedy.' 3 Williston on Sales (rev. ed.) Sec. 634.

"We conclude, as did the trial court in the first instance, that fraud vitiates the contract, and that defendants are not foreclosed by the merger clause of the contract from placing reliance upon the fraudulent representations."

In *Fossum v. Timber Structures, Inc.*, 54 Wn. 2d 317, 341 P. 2d 157 (a breach of warranty case involving a building collapse), plaintiff submitted the truss plans of the warehouse building to his own designer. The court affirmed a judgment for the plaintiff saying:

"From the evidence, the jury could have believed that, in showing the truss plans to Sanford, respondents were merely assuring themselves that the trusses would fit in with the over-all construc-

tion of the warehouse. An implied warranty of fitness may exist even though the buyer's reliance on the seller's skill and judgment is not a total reliance, and the buyer has relied on his own judgment as to some matters and on the seller as to other matters. Drager v. Carlson Hybrid Corn Co., 244 Ia. 78, 56 N.W. (2d) 18 (1952)."

So long as there was substantial evidence supporting appellant's right of recovery, the weighing of the evidence to ascertain whether there was clear, cogent and convincing evidence must be performed by the jury as the trier of the facts. The court's decision herein was clearly contrary to this principle.

In *Bland v. Mentor*, 63 Wn. 2d 150, 385 P. 2d 727, in affirming judgment for the plaintiff in a fraud action the court said:

"We have defined substantial evidence as that character of evidence which would convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed . . .

"We have said that the phrase 'clear, cogent, and convincing' evidence denotes a quantum or degree of proof greater than mere preponderance of the evidence . . .

"*We do not deem the term connotes proof beyond a reasonable doubt.*

"What constitutes clear, cogent, and convincing proof necessarily depends upon the character and extent of the evidence considered, viewed in connection with the surrounding facts and circumstances. *Whether the evidence in a given case meets the standard of persuasion, designated as clear, cogent, and convincing,* necessarily requires a process of weighing, comparing, testing, and evaluating—*a function best performed by the trier of the fact,* who usually has the advantage of actually

hearing and seeing the parties and the witnesses, and whose right and duty it is to observe their attitude and demeanor.

"The appellate function should, and does, begin and end with ascertaining whether or not there is substantial evidence supporting the facts as found. Gilbert v. Rogers, 56 Wn. (2d) 185, 351 P. (2d) 535 . . .

"The presence or absence of fraud, in a given transaction, presents a question of fact. Pletcher v. Porter, 177 Wash. 560, 33 P. (2d) 109. Fraud can be established by the direct testimony alone of an interested party. Floyd v. Myers, 53 Wn. (2d) 351, 333 P. (2d) 654. On the other hand, fraud need not be established by direct and positive evidence. *It may be proved, in whole or in part, by circumstantial evidence.* Karr v. Mahaffay, 140 Wash. 236, 248 Pac. 801."

The trial court here committed the same error as in *Trudeau v. Haubrick*, 65 Wn. 2d 286, 396 P. 2d 805. In reversing a dismissal the court said:

"We think that the trial judge erred on several grounds: First, *belief or disbelief of the testimony is for the jury.* . . .

"It is our opinion that the trial judge did not give the required 'favorable inferences' to the testimony for the plaintiff, but, instead, that he discounted it to support his decision to take the case from the jury."

In *Jacquot v. Farmers Straw Gas Producer Co.*, 140 Wash. 482, 249 Pac. 984, the court held:

"It is actionable fraud to induce the sale of the right to manufacture and sell farmers' gas plants by false representations as to the cost and places at which the gas plants could be manufactured *at a reasonable profit.*" (Syll. 1)

In *Holcomb & Hoke Mfg. Co. v. Auto Interurban Co.*, 140 Wash. 581, 250 Pac. 34, the court held:

> "Representations inducing a sale of a popcorn machine are actionable representations of fact and not mere expressions of opinion, where plaintiff represented that he had defendant's place of business under observation for several days and had computed the amount of his business as an expert, and therefrom *represented the amount of the defendant's net profits if he would buy a machine*, which representations were false and fraudulent." (Syll. 1)

See, also, to the same effect:

Petersen v. Graham, 7 Wn. 2d, 464, 110 P. 2d 149;

Hobson v. Union Oil Co., 187 Wash. 1, 8, 59 P. 2d 929 (and see dissenting opinion);

Weller v. Advance-Rumely Thresher Co., 160 Wash. 510, 295 Pac. 482;

Nyquist v. Foster, 44 Wn. 2d 465, 268 P. 2d 442;

Lambach v. Lundberg, 177 Wash. 568, 33 P. 2d 105;

Gaines v. Jordan, 64 Wn. 2d 661, 393 P. 2d 629 (last three paragraphs);

Brown v. Underwriters at Lloyds, 53 Wn. 2d 142, 332 P. 2d 228;

Marr v. Cook, 51 Wn. 2d 338, 318 P. 2d 613;

McInnis & Co. v. Western Tractor & Equipment Co., 63 Wn. 2d 652, 388 P. 2d 562; and 67 Wn. 2d 965, 410 P. 2d 908.

See also the following decisions of this Court which are to the same effect:

Hartwell Corp. v. Bumb, (9 Cir.) 345 F. 2d 453, Cert. denied, 382 U.S. 89;

Shepard v. Cal-Nine Farms, (9 Cir.) 252 F. 2d 884;

Byrnes v. Mutual Life Insurance Co., (9 Cir.), 217 F. 2d 497.

The court therefore clearly committed reversible error in discharging the jury and dismissing the action as a matter of law.

3. ACTIONABLE MISREPRESENTATIONS AS TO FUTURE PATRONAGE

Referring now to issue (B) the evidence clearly establishes, as hereinabove stated, that Rasmussen, as an inducement for the purchase, repeatedly and definitely represented and promised to appellant's representatives that appellee, through its sales staff of 27 men in the area, would procure sufficient customers and patronage for appellant so that they could operate a successful profitable service bureau business using this equipment, and that it would not be necessary for appellant to have any sales staff of its own for this purpose (R. 98-102, 105, 127-30, 134-6, 146-50, 229, 241, 243, 320-33, 369, 372-3).

The basis of the court's decision granting the nonsuit as to this claim was that there was not sufficient proof of his fraudulent intention not to perform the same. However, this was clearly erroneous for at least three reasons:

1. Rasmussen himself admitted that there was no such intention. He testified:

"Q *Was there ever any intention on your part, or as far as you know, on the part of NCR, to furnish sufficient customers to the plaintiff to make the plaintiff service bureau a profitable operation, without any sales staff of the plaintiff soliciting customers? . . .*

A *No—my answer is no.*

Q *You did not have such intention?*
A *No.* (R. 38-41)

2. Moreover this was definitely confirmed by the letter of September 14, 1964, to appellant from appellee's home office signed by J. R. Madison, its manager of accounting machine sales. This was in answer to paragraph 3 of appellant's letter, which stated:

> "We feel we have not received all the support possible from the NCR people in referring essential clients to our data service. Only two of the machines NCR supplied to their customers in our area are using our service."

In answer to that, appellee's letter stated:

> "Unfortunately, and this is not the first time this has come to our attention, *it is absolutely impossible for our local field sales organization to direct their efforts toward the sale of specific types of equipment which in effect could provide punched paper tape or card input for service operation.* Actually when we entered into this type of business *we advised all our branches and related personnel of the danger of indicating that under any circumstances the customer would be assured of specific sales volumes as related to providing processing income for any independent service bureau* or NCR service bureau anywhere in the United States." (Ex. 5, par. 3, R. 480-1)

3. Furthermore this is definitely confirmed by the fact that appellee and Rasmussen wholly failed at any time to perform this promise and representation. They procured a few customers for appellant, but only to a small and limited extent, and there was at all times a fraudulent intention not to perform the same (R. 109-11, 133-4, 179-80, 232, 287, 338, 334-5, 394-6, 398-9, 407-10, 416-7).

There was certainly sufficient prima facie evidence for the case to be submitted to the jury under appropriate instructions. The case comes within the well settled principle that where a promise to do something in the future is made with the fraudulent intention not to perform the same, it is actionable the same as a misrepresentation of an existing fact.

As stated in *Jacquot v. Farmers Straw Gas Producer Co.*, 140 Wash. 482, 249 Pac. 984, *supra*:

> "As to the second of the representations, it is undoubtedly the general rule that a promise to do something in the future is not, although it may not be performed, a ground upon which to predicate an action of fraud. *But the rule has an exception as well established as the rule itself.* If the promise is made for the purpose of inducing a party to enter into an agreement which he would not otherwise enter into, and with a present intent on the part of the person making the promise not to perform, *it is a fraud on which an action can be predicated.* Hewett v. Dole, 69 Wash. 163, 124 Pac. 374; Lovell v. Dotson, 128 Wash. 669, 223 Pac. 1061; Kritzer v. Moffat, 136 Wash. 410, 240 Pac. 355. . . .
>
> "As to question of intent, we are clear that it was for the jury. What the intent of the appellants was must be gathered from their conduct as a whole."

In *Hobson v. Union Oil Co.*, 187 Wash. 1, 59 P. 2d 929, *supra*, the court said:

> "Counsel notes an exception to this general rule, which they quote from 26 C.J. 1093, as follows:
>
> " 'Since *the state of a man's mind is as much a fact as the state of his digestion*, the weight of authority holds that if the falsity of the statement can be established, the misrepresentation of opinion, belief, or intent is an actionable representation of fact. This redress may be had for the dishonest

expression of an opinion contrary to that really entertained by the speaker . . . '

"Further, there was the notice dated March 23, 1934, terminating the contracts, which was not long after the second contracts were executed. Certainly, there was evidence of facts and circumstances from which *the jury had the right to conclude an intention* contrary to that inferred from the statement, 'I do not see any reason why you should not stay here the full term.' "

In *Kritzer v. Moffat*, 136 Wash. 410, 240 Pac. 355, 44 A.L.R. 681, the court said:

"Their allegations are, in effect, that the appellant made certain representations and certain promises with reference to matters then under consideration between them, which representations were false and which promises he then had no intention of keeping or performing. . . . *That such an action will lie, the authorities generally hold.* . . .

"In Edgington v. Fitzmaurice, 29 Ch. Div. 459, 483, occurs Lord Bowen's well-known dictum that:

" '*The state of a man's mind is as much a fact as the state of his digestion.* It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else.' . . .

"In Hill v. Gettys, 135 N.C. 373, 47 S.E. 449, the court said:

" 'When a promise is made with no intention of performing it, and for the very purpose of accomplishing a fraud, it is a most apt and effectual means to that end, and the victim has a remedy by action or defense.' Goodwin v. Horne, 60 N.H. 485. '*The intent is always a question for the jury,* and to determine whether the intent was fraudulent the jury have necessarily to look to the circumstances connected with the transaction or those immedi-

ately preceding or following it.' Des Farges v. Pugh, 93 N.C. 31, 53 Am. Rep. 446.

"In 26 C.J. 1093, this language is found:

" 'Since the state of a man's mind is as much a fact as the state of his digestion, the weight of authority holds that if the falsity of the statement can be established the misrepresentation of opinion, belief, or intent is an actionable representation of fact. This redress may be had for the dishonest expression of an opinion contrary to that really entertained by the speaker, especially if he is an apparently disinterested third person, or if a deliberately false opinion is expressed in terms importing personal knowledge of its truth, or for a promise made with the present intent of future breach. . . .

"But we are equally clear that the plaintiffs had a remedy at law. If the appellant made false statements and promises which he did not intend to keep, and thereby lulled the plaintiffs into the forbearance of a legal right to their injury, it was a fraud for which an action at law will lie. . . .

"It is next contended that a promissory statement cannot be the basis of an action for deceit, and that here the statements are of this sort. But the doctrine is true only to a limited extent. *A fraudulent promise which induced a person to act in such a way as to affect his legal right, or to alter his position to his injury, is actionable.* Pocatello Security Trust Co. v. Henry, 35 Idaho 321, 206 Pac. 175.

"It is next urged that the evidence is insufficient to sustain the verdict. We have carefully examined the testimony, and, while its perusal has convinced us that the jury could well have found for the other side, we find *substantial evidence on all of the issues necessary to support the plaintiff's case.* This ends the inquiry in this court. . . .

"Our powers are limited to the inquiry whether there is substantial evidence in support of the verdict."

In *Federal Finance Co. v. Cass*, 235 N.W. 579, the Supreme Court of Nebraska said:

> "It has been held in the case of Larmon v. Knight, 140 Ill. 232, 30 N.E. 318, 33 Am. St. 229, that *the evidence of evil intent at the time the promise was made may be inferred from a failure to comply with the promise, and that the promisor may be presumed to have intended when he made the promise to do what he finally did do.*"

The federal cases are to the same effect:

Equitable Life & Casualty Insurance Co. v. Lee, (9 Cir.) 310 F. 2d 263;

Philadelphia Storage Battery Co. v. Kelley, (8 Cir.) 64 F. 2d 834, certiorari denied, 290 U.S. 651;

Woods-Faulkner & Co. v. Michelson, (8 Cir.) 63 F. 2d 569, 573;

Howard v. Howe, (7 Cir.) 61 F. 2d 577, certiorari denied, 289 U.S. 731;

Seaboard Terminal & Refrigeration Co. v. Droste, (2 Cir.) 80 F. 2d 95, 96;

Hirsch v. Archer, (2 Cir.) 258 F. 2d 44.

See also to the same effect:

37 C.J.S. 231, 237, Sec. 11, 12, and cases cited;

Annotation 51 A.L.R. 46, 63-81, 94, 163, and cases cited;

23 Am. Jur. 789, Sec. 32;

Kausky v. Kosten, 27 Wn. 2d 721, 179 P. 2d 950;

Murdoch v. Leonard, 1 Wn. 2d 37, 95 P. 2d 37;

Peterson v. Hicks, 43 Wash. 412, 86 Pac. 634.

CONCLUSION

We therefore respectfully submit that as to both issues (A) and (B) hereinabove mentioned appellant established a sufficient prima facie case, and the court erred in discharging the jury and dismissing the action as a matter of law.

Respectfully submitted,

ELWOOD HUTCHESON
Attorney for Appellant

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with these rules.

ELWOOD HUTCHESON
Attorney

APPENDIX

Index of Exhibits

		Admitted
P-1	Documents re negotiation of sale	R. 7
2	Equipment orders, sales contracts and lease contract	7
3	Letters to plaintiff from defendant in Dec. 1961, re equipment order	7
4	Checks (3)	7
5	Correspondence between parties (5 letters)	7
6	Agreement for resale of equipment and invoice	525
10	Answers to interrogatories	20
D-27	Advertisement	403